Supreme Court, U.S.
FILED
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No. 92-102

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

WILLIAM DAUBERT and JOYCE DAUBERT, Individually and As Guardians Ad Litem for JASON DAUBERT, and ANITA DE YOUNG, Individually and As Guardian Ad Litem for ERIC SCHULLER,

Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE STATES OF TEXAS, MONTANA, IDAHO, AND SOUTH DAKOTA, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici Curiae, the States of Idaho, Montana, South Dakota and Texas, file this brief to urge this Court's most careful attention to the important State interests threatened by the Ninth Circuit's holding below that the "general acceptance" test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), may be used to exclude scientific evidence in federal civil litigation. *Daubert v. Merrell Dow Pharmaceuticals, Inc* , 951 F.2d 1128 (9th Cir. 1991). An affirmance of any use of *Frye* in diversity cases like this one, raising garden-variety tort and contract issues arising solely under state law, would have a significant adverse effect on the substantive law of the States. At least 45 States decline to impose on plaintiffs in civil cases any special burden of making a threshhold showing that their scientific testimony enjoys general acceptance. Therefore, use of the judge-made *Frye* rule where the law of these States controls would plainly violate the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

ARGUMENT

It would appear that *any* use of the *Frye* rule to exclude evidence in federal court is ruled out by Fed. R. Evid. 402, which lists all sources of rules for excluding relevant evidence but fails to include among those sources judge-made exclusionary doctrines in general, and *Frye* in particular. If, despite Rule 402, this Court were to conclude that it has some discretion to adopt the *Frye* rule for use in federal litigation, *amici* urge that *Frye* be strictly limited to the federal criminal law context in which it has been traditionally employed for decades by the lower federal courts.

This Court has never ratified use of the *Frye* test, but the lower federal courts have long employed it, leading to dozens of reported appellate opinions. The overwhelming proportion of federal appellate cases analyzing the admissibility of scientific evidence under *Frye* — sixty-six reported cases in all — have

reviewed criminal trials.[1] *Frye* has traditionally been understood

[1] *United States v. Todd*, 964 F.2d 925, 930-31 (9th Cir. 1992); *United States v. Jakobetz*, 955 F.2d 786 (2nd Cir. 1992), *cert. denied*, 121 L.Ed.2d 63 (1992); *United States v. Lopez-Navalles*, 931 F.2d 898 (9th Cir. 1991); *United States v. Hadley*, 918 F.2d 848, 853 (9th Cir. 1990), *cert. dismissed*, No. 91-6646, 1992 U.S. LEXIS 7341; *United States v. Two Bulls*, 918 F.2d 56, 57-62 (8th Cir. 1990), *reh'g granted, vacated, en banc*, 925 F.2d 1127 (1991); *United States v. Boise*, 916 F.2d 497, 503 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2057 (U.S. 1991); *United States v. Piccinonna*, 885 F.2d 1529, 1530-37 (11th Cir. 1989); *United States v. Smith*, 869 F.2d 348, 349-54 (7th Cir. 1989); *United States v. Gillespie*, 852 F.2d 475, 480-81 (9th Cir. 1988); *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988), *reh'g denied en banc*, 859 F.2d 928 (1988), *cert. denied*, 488 U.S. 1034 (1988) (habeas case); *Little v. Armontrout*, 835 F.2d 1240, 1241-45 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988) (habeas case); *U.S. v. Christophe*, 833 F.2d 1296, 1297-1300 (9th Cir. 1987); *Little v. Armontrout*, 819 F. 2d 1425, 1426-35 (8th Cir. 1987) (habeas case); *United States v. Kozminski*, 821 F.2d 1186, 1193-95, 1198-1219 (6th Cir. 1987); *United States v. Shorter*, 809 F.2d 54, 58-61 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 817 (1987); *United States v. Kimberlin*, 805 F.2d 210, 216-23 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987); *United States v. Gwaltney*, 790 F.2d 1378, 1381-83 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987); *United States v. Darcy*, 783 F.2d 1389, 1391, 1394-97 (9th Cir. 1986); *United States v. McBride*, 786 F.2d 45, 49-50 (2nd Cir. 1986); *United States v. Metzger*, 778 F.2d 1195, 1203-1204 (6th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986); *United States v. Ferri*, 778 F.2d 985, 988-90 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986); *United States v. Smith*, 776 F.2d 892, 898 (10th Cir. 1985); *United States v. Davis*, 772 F.2d 1339, 1341-47 (7th Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985); *United States v. Solomon*, 753 F.2d 1522, 1523-1526 (9th Cir. 1985); *United States v. Downing*, 753 F.2d 1224, 1226-44 (3rd Cir. 1985); *United States v. Gould*, 741 F.2d 45, 48 (4th Cir. 1984); *United States v. Torniero*, 735 F.2d 725, 731 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985); *United States v. Valdez*, 722 F.2d 1196, 1200-05 (5th Cir. 1984); *United States v. Lewellyn*, 723 F.2d 615, 618-20 (8th Cir. 1983); *United States v. Fleishman*, 684 F.2d 1329, 1336-37 (9th Cir. 1982); *United States v. Black*, 684 F.2d 481, 482-84 (7th Cir. 1982), *cert. denied*, 459 U.S. 1043 (1982); *United States Ex Rel. DiGiacomo v. Franzen*, 680 F.2d 515, 516-20 (7th Cir. 1982); *United States v. Tranowski*, 659 F.2d 750, 751-57 (7th Cir. 1981); *United States v. McFillin*, 713 F.2d 57, 58-61 (4th Cir. 1981), *cert. denied*, 454 U.S. 1057 (1981); *McMorris v. Israel*, 643 F.2d 458, 459-66 (7th Cir. 1981),*cert. denied*, 455 U.S. 967 (1982) (habeas case); *United States v. Distler*, 671 F.2d 954, 960-62 (6th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981); *United States v. Clark*, 622 F.2d 917 (5th Cir. 1980), *cert. denied*, 449 U.S. 1128 (1981); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979); *United States v. Williams*, 583 F.2d 1194, 1196-1201 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); *Hughes v. Mathews*, 576 F.2d 1250, 1258 (7th Cir. 1978), *cert. dismissed sub nom., Isreal v. Hughs*, 439 U.S. 801 (1978) (habeas case);

as a doctrine governing criminal trials, predicated on concern about the special impact that novel forms of scientific investigation might have in criminal litigation, given the stakes involved. For example, the leading scholarly article on the *Frye* rule, published in 1980, is devoted to the many ramifications of *Frye* for criminal law, and does not discuss the use of *Frye* in civil cases. *See* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 Colum. L. Rev. 1197 (1980).

One function of *Frye* is to ensure that the value of novel forensic techniques can be intelligently contested by both sides in a criminal trial: "the *Frye* test protects prosecution and defense alike by assuring that a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case." *United States v. Addison*, 498 F.2d 741, 743

United States v. Kilgus, 571 F.2d 508, 508-10 (9th Cir. 1978); *United States v. Bad Cob*, 560 F.2d 877, 881-84 (8th Cir. 1977); *United States v. McDaniel*, 538 F.2d 408, 412-14 (D.C. Cir. 1976); *United States v. Alexander*, 526 F.2d 161, 162-70 (8th Cir. 1975); *United States v. Oliver*, 525 F.2d 731, 733-37 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976); *United States v. Marshall*, 526 F.2d 1349, 1360 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. Carter*, 522 F.2d 666, 684-86 (D.C. Cir. 1975); *United States v. Baller*, 519 F.2d 463, 464-67 (4th Cir. 1975), *cert. denied*, 423 U.S. 1019 (1975); *United States v. Franks*, 511 F.2d 25, 33 (6th Cir. 1975), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Cochran*, 499 F.2d 380, 393 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975); *United States v. Addison*, 498 F.2d 741, 741-45 (D.C. Cir. 1974); *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974); *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973); *United States v. Frogge*, 476 F.2d 969, 969-70 (5th Cir. 1973), *cert. denied*, 414 U.S. 849 (1973); *United States v. De Betham*, 470 F.2d 1367, 1368 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973); *United States v. Alexander*, 471 F.2d 923, 955 (D.C. Cir. 1972), *cert. denied sub nom.*, Murdock v. United States, 409 U.S. 1044 (1972); *United States v. Parman*, 461 F.2d 1203, 1204-05 (D.C. Cir. 1971); *United States v. Brown*, 461 F.2d 134, 145 (D.C. Cir. 1972); *United States v. Stifel*, 433 F.2d 431, 435-41 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *United States v. Tremont*, 351 F.2d 144, 146 (6th Cir. 1965), *cert. denied*, 383 U.S. 944 (1966); *McCroskey v. United States*, 339 F.2d 895, 897 (8th Cir. 1965); *United States v. McDevitt*, 328 F.2d 282, 283-84 (6th Cir. 1964); *Marks v. United States*, 269 F.2d 377, 382 (10th Cir. 1959); *Lindsey v. United States*, 237 F.2d 893, 894-96 (9th Cir. 1956); *Tyler v. United States*, 193 F.2d 24, 31 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952); *Medley v. United States*, 155 F.2d 857, 860 (D.C. Cir. 1946), *cert. denied*, 328 U.S. 873 (1946).

(D.C. Cir. 1974). But *Frye* is not entirely even-handed: its rationale stems largely from a desire to guard against possible unfairness to defendants, by placing additional burdens on the prosecution when novel scientific evidence is offered. *See, e.g., United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977) ("A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness,' although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field"); *United States v. Fleishman*, 684 F.2d 1329, 1337 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982) (*Frye* rule flows from a "concern[] with the possible prejudice to the defendant's right to a fair trial of admitting testimony of purported experts based upon insufficiently substantiated scientific theories, techniques or tests"); Giannelli, *supra*, at 1244 ("The underlying problem is that the 'burden of rebuttal is generally borne in these criminal cases by defendants without the economic means to marshal scientific witnesses for a battle of the experts'") (citation omitted).

If the policy assumptions animating the *Frye* test are in fact well founded, then *Frye* and its progeny in the lower federal courts may be a proper exercise of the supervisory power over criminal cases. Long ago this Court recognized that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943). Whether or not this Court is inclined to uphold the *Frye* doctrine in federal criminal trials on this basis, the past use of *Frye* in the criminal context lends no legitimacy to the use of *Frye* to impose a special judge-made rule for scientific evidence for *civil* trials, particularly trials in which state law supplies the rule of decision.

Indeed, perhaps in recognition of these principles, *Frye* has almost never been applied by the federal appellate courts to uphold exclusion of evidence in a civil trial. In each of the few instances in which it was applied, the appellate court failed to

provide any rationale for extending *Frye* into the civil arena. In 1984, the Fifth Circuit employed *Frye* to overturn a district court's admission of a type of "voice stress analysis" in a civil diversity case involving an insurance claim; in support, the court cited only federal criminal cases relying on *Frye*, and wholly failed to consider the propriety of imposing *Frye* in a civil case. *See Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1031 (5th Cir. 1984). Seven years later, the Fifth Circuit again employed *Frye* in a civil diversity case, again without providing any justification for doing so, to exclude the testimony of a qualified medical expert on the cause of a rare form of cancer, on the ground that the expert's reasoning was not "generally accepted." *See Christophersen v. Allied Signal Corp.*, 939 F.2d 1106, 1115-16 (5th Cir.) (per curiam) (en banc), *cert. denied*, 112 S. Ct. 1280 (1991). The Ninth Circuit decision below is only the third federal appellate decision to use *Frye* to exclude evidence in a diversity case; again, no rationale for extending *Frye* beyond the criminal context involving due process and supervisory powers was provided. *See Daubert*, supra, 951 F.2d at 1129-30.

An affirmance by this Court of the Ninth Circuit's application of *Frye* in a civil diversity case would attack the integrity of the substantive law of the States and would read the Federal Rules of Evidence in a way that States could not have envisioned in 1975 — preventing the political safeguards of federalism from operating. The States have chosen to provide their citizens with private causes of action, under statute and common law, through which they may receive compensation for harms caused by toxic substances and defective products, and thereby also to deter similar future harms. Inherently, such claims impose on plaintiffs the difficult task of establishing such complex facts as dangerousness and causation — matters that almost inevitably require the presentation of scientific evidence. How such issues are proven, and what types of evidence are sufficient to permit recovery, are part and parcel of the States' policy judgment as to the nature and scope of the cause of action. To demand that plaintiffs present the testimony of experts whose form of reasoning about standard sources of information meets

a "rigorous standard" that includes all elements of "generally accepted scientific methodology," including peer review and publication, *Daubert*, *supra*, 951 F.2d at 1131, is to impose a significant burden to recovery that *no State* currently imposes on plaintiffs in state court. In brief:

• Twenty-five States have declined to adopt the *Frye* "general acceptance" test, have rejected it, or do not use it to the exclusion of other tests in ruling on the admissibility of novel scientific evidence in criminal or quasi-criminal cases (such as paternity suits).[2]

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[2] **Arkansas**: *Prater v. State*, 820 S.W.2d 429, 431 (Ark. 1991) ("courts may look to a number of other factors which bear upon reliability").

Colorado: *People v. Hampton*, 746 P.2d 947, 950-51 (Colo. 1987).

Delaware: *Santiago v. State*, 510 A.2d 488, 489 (Del. 1986) ("*Frye* 'general acceptance' test is not the sole test for judging admissibility of expert testimony concerning scientific test results in Delaware").

Florida: *Andrews v. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988), rev. denied, 542 So. 2d 1332 (Fla. 1989) (relevancy test should be applied rather than Frye general acceptance test).

Georgia: *Caldwell v. State*, 393 S.E. 2d 436, 441 (Ga. 1990); *Harper v. State*, 292 S.E.2d 389, 395-96, (Ga. 1982) ("the *Frye* rule of 'counting heads' in the scientific community in not an appropriate way to determine the admissibility of a scientific procedure in evidence," id. at 395).

Hawaii: *State v. Montalbo*, 828 P.2d 1274, 1279-81 (Hawaii 1992) (*Frye* "general acceptance" standard is only one of several factors to be weighed in determining whether scientific evidence is reliable and should be admitted).

Idaho: *State v. Rodgers*, 812 P.2d 1208, 1210-12 (Idaho 1991); *State v. Crea*, 806 P.2d 445, 448 (Idaho 1991).

Iowa: *State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1990).

Louisiana: *State v. Catanese*, 368 So.2d 975, 978-81 (La. 1979) ("[c]learly, the criteria used for determining the admissibility of scientific evidence should not require the instant and unquestionable demonstration required for the judicial notice of scientific facts").

Maine: *State v. LeBlanc*, 559 A.2d 349, 351 (Me. 1989); *State v. Williams*, 388 A.2d 500, 502-04 (Me. 1978) ("there is no justifiable distinction in principle arising becuase such expert testimony may happen to involve newly ascertained or newly applied scientific principles").

Montana: *State v. Walters*, 806 P.2d 497, 501 (Mont. 1991); *Barmeyer v. Montana Power Co.*, 657 P.2d 594, 598 (Mont. 1983) ("the general acceptance rule is not in conformity with the spirit of the new rules of evidence").

Nevada: *Santillanes v. State*, 765 P.2d 1147, 1150 n. 3 (Nev. 1988) ("In the sixty-five years since *Frye* was decided we have neither cited to nor adopted the decision").

• The bulk of the remaining States, twenty in all, do apply the *Frye* approach in at least some criminal or quasi-criminal cases but, as with the overwhelming precedent at the federal appellate level, do not employ *Frye* in civil cases.[3]

North Carolina: *State v. Pennington*, 393 S.E.2d 847, 852 (N.C. 1990); *State v. Bullard*, 322 S.E.2d 370, 380 (N.C. 1984) ("our court does not adhere exclusively to the *Frye* formula").

North Dakota: *State v. Brown*, 337 N.W.2d 138, 148, 148 n. 6 (N.D. 1983).

Ohio: *State v. Williams*, 446 N.E.2d 444, 446-48 (Ohio 1983) ("we refuse to engage in scientific nose-counting for the purpose of deciding whether evidence based on newly ascertained or applied scientific priciples is admissible").

Oregon: *State v. Brown*, 687 P.2d 751, 755-60 (Or. 1984) (rejecting *Frye* "general acceptance" test and adopting a seven-factor "relevancy" test to determine the relevance or probative value of proffered scientific evidence).

Rhode Island: *State v. Wheeler*, 496 A.2d 1382, 1388-89 (R.I. 1985).

South Carolina: *State v. Ford*, 392 S.E.2d 781, 783 (S.C. 1990) (accepting DNA evidence) ("South Carolina has never specifically adopted the *Frye* test and has employed a less restrictive standard in regard to the admissibility of scientific evidence").

Tennessee: *State v. Johnson*, 717 S.W.2d 298, 303 (Tenn. Crim. App. 1986) ("the modern trend, expressed in the Federal Rules of Evidence, is away from the *Frye* test").

Texas: *Kelly v. State*, 824 S.W.2d 568, 570-72 (Tex. Crim. App. 1992) (rejecting *Frye* standard and applying relevancy standard).

Utah: *State v. Tuttle*, 780 P.2d. 1203, 1211 n.8 (Utah 1989), *cert. denied*, 494 U.S. 1018 (1990).

Virginia: *O'Dell v. Commonwealth*, 364 S.E.2d 491, 504 (Va. 1988) (declining to adopt *Frye* standard).

West Virginia: *State v. Woodall*, 385 S.E.2d 253, 259-60 (W. Va. 1989).

Wisconsin: *State v. Blair*, 473 N.W.2d 566, 572 n. 9 (Wis. Ct. App.1991), *review denied*, 477 N.W.2d 287 (1991); *State v. Walstad*, 351 N.W.2d 469, 485-87 (Wis. 1984) ("The *Frye* concept is alien to the Wisconsin law of evidence.").

Wyoming: *Rivera (Kerry) v. State*, No. 90-163, 1992 WL 312899, at *7 (Wyo. Oct. 30, 1992) (subject to revision or withdrawal) (rejecting *Frye* and relying on Rule 702 standard).

[3] **Alabama**: *Adams v State*, 484 So.2d 1160, 1162 (Ala. Crim. App. 1985) (*Frye* test used to exclude expert testimony based on information obtained through hypnotic means); *Prewitt v. State*, 460 So.2d 296, 301-304 (Ala. Crim. App. 1984) ("In appropriate cases, Alabama follows the rule in

Frye," *id.* at 301); *but cf. Sexton v. State*, 529 So.2d 1041, 1049 (Ala. Crim. App.1988) (*Frye* not applied where factors of necessity, reliability, understandability, and importance dictated the admissibility of physician's expert testimony on behavior of child abuse victims).

Alaska: *Contreras v. State*, 718 P.2d 129, 134-36 (Alaska 1986); *Beagel v. State*, 813 P.2d 699, 707-8 (Alaska Ct. App. 1991).

California: *People v. Kelly* 549 P.2d 1240, 1244-46, 1250-51 (Cal. 1976) (using Frye to reject voiceprint analysis); but *cf. People v. McDonald*, 690 P.2d 709, 723-24 (Cal. 1984) (distinguishing between expert testimony and scientific evidence and holding *Kelly-Frye* rule inapplicable to expert testimony on eyewitness identification).

Connecticut: *State v. Miller*, 522 A.2d 249, 260 (1987); *State v. Atwood*, 479 A.2d 258, 263-64 (1984).

District of Columbia: *Jones v. United States*, 548 A.2d 35, 39-47 (D.C. App. 1988).

Illinois: *People v. Eyler*, 549 N.E.2d 268, 285-86 (Ill. 1989), cert. denied, 111 S.Ct. 215 (U.S. 1990); *People v. Milone*, 356 N.E.2d 1350, 1356-59 (Ill. App. Ct. 1976).

Indiana: *People v. Baynes*, 430 N.E.2d 1070, 1074-1079 (Ind. 1983) (citing *Frye* in excluding polygraph evidence but not explicitly adopting *Frye* test); *cf. Hopkins v. State*, 579 N.E.2d 1297, 1305-06 (Ind. 1991) (concurring opinion suggesting that *Frye* has not been conclusively adopted).

Kansas: *State v. Witte*, 836 P.2d 1110, 1116-21 (Kan. 1992); *Smith v. Deppish*, 807 P.2d 144, 157-59 (Kan. 1991); *State v. Washington*, 622 P.2d 986, 991-92 (Kan. 1981).

Kentucky: *Perry v. Commonwealth*, 652 S.W. 2d 655, 661 (Ky. 1983).

Maryland: *Cobey v. State*, 533 A.2d 944, 946-50 (Md. Ct. Spec. App. 1987), *cert. denied*, 538 A.2d 778 (1988); *Reed v. State*, 391 A.2d 364, 368-77 (Md. 1978).

Massachusetts: *Commonwealth v. Curnin*, 565 N.E.2d 440, 443 (Mass. 1991); *Commonwealth v. Fatalo*, 191 N.E.2d 479, 479-81 (Mass. 1963).

Minnesota: *State v. Fenney*, 448 N.W.2d 54, 57-58 (Minn. 1989); *State v. Mack*, 292 N.W.2d 764, 767-68 (Minn. 1980) (hypnotically induced testimony inadmissible under *Frye* standard).

Mississippi: *Goodson v. State*, 566 So.2d 1142, 1146 (Miss. 1990) (citing a general acceptance test but not citing *Frye* by name).

Nebraska: *State v. Reynolds*, 457 N.W.2d 405, 417-18 (Neb. 1990).

New Hampshire: *State v. Stewart*, 364 A.2d 621, 623 (N.H. 1976) (excluding polygraph evidence); *State v. Coolidge*, 260 A.2d 547, 560-61 (N.H. 1969), *cert. rev'd on other grounds*, 90 S.Ct. 2253 (1970).

New Mexico: *State v. Blea*, 681 P.2d. 1100, 1103 (1984).

Oklahoma: *Rawlings v. State*, 740 P.2d 153, 161 (Okla. Crim. App. 1987); *Driskell v. State*, 659 P.2d 343, 356 (Okla. Crim. App. 1983).

Pennsylvania: *Commonwealth v. Rodgers*, 605 A.2d 1228, 1234-35 (Pa. Super. Ct. 1992); *Commonwealth v. Nazarovitch*, 436 A.2d 170, 172-73 (Pa. 1981).

South Dakota: *State v. Adams*, 418 N.W.2d 618, 620 (S.D.1988); *State v. Helmer*, 278 N.W.2d 808, 812 (S.D. 1979).

Washington: *State v. Ortiz*, 831 P.2d 1060 (Wash. 1992).

• A handful of States have applied the *Frye* approach in at least some civil (as well as criminal) litigation, but appear to limit *Frye* to the traditional context of novel devices or procedures, and have never permitted its use in a civil case to scrutinize the reasoning of qualified expert witnesses based on standard sources of information in the relevant field.[4]

[4] **Arizona**: *Baroldy v. Ortho Pharmaceutical Corp.*, 760 P.2d 574, 581-82 (1987) (civil case refusing to apply *Frye* to the occlusion theory used as a basis for experts' opinion that a particular diaphragm caused toxic shock, explaining that "occlusion theory . . . is not the sort of 'procedure' or 'technique' to which the 'general acceptance' test of *Frye* is usually applied, but rather is a scientific hypothesis of causation"); *Troutman v. Valley National Bank of Arizona*, 826 P.2d 810, 815 (Arizona Ct. App. 1992) (civil case involving personal injury action by an injured party against the decedent's estate and admissibility of expert testimony on "thermogram" test results); *State ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1285-95 (1982) (criminal case applying *Frye* to hypnosis).

Michigan: *Mulholland v. DEC Int'l Corp.*, 443 N.W.2d 340, 343 n.1 (Mich. 1989) (specific legislative adaptation of Rule 702 requires use of *Frye* standard in all cases); *People v. Marsh*, 441 N.W.2d 33, 34-36 (Mich. App. 1989) (admissibility of bite-mark analysis in a criminal case is not dependent on meeting *Davis-Frye* standard -- although idea of test is novel, the procedures and technology used to implement it are not).

Missouri: *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 189 n. 79 (Mo.App. 1988), *cert. denied*, 493 U.S. 817 (1989) (civil toxic tort case finding medical expert's methodology not to be excludable); *State v. Elbert*, 831 S.W.2d 646, 648 (Mo. Ct. App. 1992); *Alsbach v. Bader*, 700 S.W.2d 823, 828 (Mo. 1985); *State v. Stout*, 478 S.W.2d 368 (Mo. 1972).

New Jersey: *Windmere, Inc. v. International Ins. Co.*, 522 A.2d 405, 412 (N.J. 1987) (civil excluding expert testimony on voiceprints in case involving non-payment of insurance proceeds following arson); *but cf. Rubanick v. Witco Chemical Corp.*, 593 A.2d 733, 740-42, 746-48 (N.J. 1991) (rejecting "general acceptance" standard of *Windmere* and *Frye* in toxic tort cases); *Landrigan v. Celotex Corp.* 605 A.2d 1079, 1083-89 (N.J. 1992) (applying *Rubanick*). *See also State v. Hurd*, 432 A.2d 86, 89-92 (N.J. 1981) (criminal case setting standards for admissibility of post-hypnotic testimony).

New York: *Cameron v. Knapp*, 520 N.Y.S.2d 917, 918 (N.Y. 1987) (*Frye* standard used to bar handwriting analysis in medical malpractice action); *People v Mohit*, 579 N.Y.S.2d 990, 991-92 (N.Y. Co. Ct. 1992); *People v. Castro*, 545 N.Y.S.2d 985, 986-99, (N.Y. Sup. Ct. 1989) (creating "*Frye* plus" standard for DNA admissibility); *People v. Hughes*, 453 N.E.2d 484,

The approach to *Frye* embodied in the decision below therefore presents a classic violation of this Court's *Erie* jurisprudence. The Ninth Circuit's use of the *Frye* to require increased judicial scrutiny of a particular class of evidence — here, scientific evidence — is surely substantive within the meaning of *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446-47 (1959). *Frye* cannot survive in this civil diversity context to throw out a litigant's entire case merely because his or her expert testimony is not "generally accepted," because such a rule is exactly the type of rule *Erie* was meant to combat. The violation is especially clear here because *Frye* is, *at most*, a judge-made rule not required by any Act of Congress. *Cf. Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945) (*Erie* requires adherence to any type of state rule having "consequences that . . . intimately affect recovery or non-recovery"). Outright dismissal of a case based on the *Frye* rule, where the case would have gone forward in state court, obviously effects inequitable administration of the laws and encourages rampant forum shopping, thereby violating both of the "twin aims" of the *Erie* doctrine. *See Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2127 (1991); *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1218 (1991). Moreover, it directly affects matters that are "bound up with" state-created rights and obligations. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

The *Erie* problems that would be created by an affirmance by this Court were vividly sketched by the five judges who disagreed with the *en banc* majority in the recent Fifth Circuit *Christophersen* decision. One judge argued: "[I]f *Frye* is a rule of evidence, it has not survived the enactment of the Federal Rules of Evidence. . . . [I]f it is a substantive rule, its adoption in diversity cases is foreclosed by *Erie*." 939 F.2d at 1120 (Clark, J., concurring in the result) (citations omitted). Four other judges explained that to apply *Frye* to expert causation testimony was so decisive to the outcome of cases that its imposition "substantially affect[s] the rights of claimants and the

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490-97 (N.Y. 1984) (*Frye* standard applied to render victim's posthypnotic recollections inadmissible at defendant's rape trial).

proof required for their compensation." 939 F.2d at 1135 (Reavley, J., dissenting). These judges pointed out that "[u]nder Texas law, claimants [did] not suffer these disadvantages," and thus there was "no doubt that in Texas courts Mrs. Christophersen would have received her jury trial." *Id.* at 1135-36 & n.48. "This lack of congruence with the state courts in cases dependent on our diversity jurisdiction," these judges argued, "is fundamentally at odds with the Supreme Court's decision in *Erie*. As a result, we encourage reverse forum shopping and deprive plaintiffs of the substantive rights that should be available to them under state law." *Id.* at 1137-38 (King, J., dissenting).[5]

CONCLUSION

For these reasons, *amici* respectfully request this Court to reverse the decision below and to hold that, if the *Frye* rule has any remaining viability at all on the federal level, it may only be employed in criminal litigation.

Respectfully submitted,

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[5] Other federal appellate panels faced with requests similar to those in *Christophersen* to "screen out" particular kinds of evidence in diversity cases have recognized the *Erie* implications of such an effort, and have refused to permit judicial creation of "heightened scrutiny" in derogation of state law. In *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 952 (3d Cir. 1990), for example, the Third Circuit wrote that "we [are not] at liberty, *especially in a case to be decided under our diversity jurisdiction*, to impose different burdens of proof on Bendectin plaintiffs than those that would apply in analogous products liability suits." (Emphasis added). Similarly, the Fifth Circuit, relying in part on "the dictates of *Erie*, that we remain faithful to the law of Texas," rejected an attempt to create a special procedural framework designed to resolve in a single stroke a large class of asbestos cases. *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (Higginbotham, J.).

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December 2, 1992